

SRC APPROVED

Date Oct 8, 2009
SLM

State Records Committee Meeting

Division of Archives, Courtyard Meeting Room

September 10, 2009

Salt Lake City, Utah

Members Present: Scott Daniels, Citizen Representative
Chris Hansen, History Designee
Lex Hemphill, Media Representative
Gary Ott, Elected Official Representative
Betsy Ross, State Auditor's Office
Patricia Smith-Mansfield, Governor's Designee
Scott Whittaker, Private Sector Records Manager, Chair

Legal Counsel: Paul Tonks, Attorney General's Office
Ed Lombard, Attorney General's Office

Executive Secretary: Susan Mumford, Utah State Archives

Others Attending: Nate Carlisle, Salt Lake Tribune
Rosemary Cundiff, Archives Staff
Rick Egan, Salt Lake Tribune
Blaine Ferguson, Utah Attorney General's Office
Dan Harrie, Salt Lake Tribune
Jerrold Jensen, Utah Attorney General's Office
Maren Jeppsen, Archives Staff
Cathy McKittrick, Salt Lake Tribune
Paul Murphy, Utah Attorney General's Office
Mike O'Brien, Salt Lake Tribune
Ronald Ockey, Utah Attorney General's Office
Tiffany O'Sheal, Archives Staff
Eric Peterson, Salt Lake City Weekly, Petitioner
Scott Reed, Utah Attorney General's Office
Stephen Sorenson, U.S. Attorney General's Office

Mr. Scott Whittaker called the meeting to order at 9:00 a.m.

First Hearing: Cathy McKittrick vs. Utah Attorney General's Office

Mr. Whittaker had the parties for the hearing introduce themselves. Cathy McKittrick, the petitioner and Dan Harrie from the Salt Lake Tribune were present. Jerrold Jensen and Scott Reed represented the Attorney General's Office. Mr. Whittaker explained the procedures for the hearing. A letter had been received from the U.S. Attorney's Office weighing in on the side of the respondent. The Committee members had read the letter.

Opening statement – petitioner

Mr. Michael Patrick O'Brien, counsel for the petitioner, said the original request had been for a particular letter from the Utah Attorney General's Office to the U.S. Attorney's Office. The letter was of public interest as a communication between public officials in an official capacity about important public issues. It concerned Utah's two top law officials and their ability to work together. Both officials at the time of the communication were running for public office. The letter should not be classified as protected, but should be made public. This was a Government Records Access and Management (GRAMA) request. Pursuant to 63G-2-305(25), a personal recommendation regarding an individual can be deemed to be "protected" if disclosure would be a clearly unwarranted invasion of privacy or if disclosure would not be in the public interest. The letter was written in the course of official business about official duties, not personal issues. Disclosure would be in the public interest. The State Records Committee could, if they find the letter to be properly classified as protected, weigh the public interest and release it.

Opening statement – respondent

Mr. Jerrold Jensen said that at first glance, the letter looked like it should be a public document. On closer examination, communication between the Utah Attorney General's Office and the U.S. Attorney General's Office could escalate a conflict that has been resolved, and disclosure would not be in the public interest. The letter was sent to Eric Holder, the new U.S. Attorney General's personal residence in Washington, D.C. It was an attempt to resolve a problem between people and to work out an internal issue. The letter was written at the invitation of Attorney General Holder to notify him if there were any problems working with his office. It mentioned some issues between Attorney General Mark Shurtleff and Brett Tolman. The letter has not been disseminated and the differences between the offices are being resolved. The Attorney General's Office believes it would not be in the public interest to fan the flames of a minor dispute about how the offices interface with regard to resource and law enforcement issues.

Testimony

Cathy McKittrick said that in June in a television interview, Mark Shurtleff said he had written a letter to Attorney General Eric Holder about Brett Tolman being uncooperative with his office. The Tribune interviewed both Shurtleff and Tolman for a story. Mr. Tolman had said he was unaware that the situation was that strained. A GRAMA request was made on June 15, 2009, for the letter. All correspondence from January 1 was requested because the date of the letter was unknown. The Chief Deputy Attorney General, Kirk Torgenson, responded that more time was needed in view of the broad request. Eventually one letter was released that did not address the issue. When the date of the letter was discovered, an appeal was filed specifying the letter. A denial was received classifying the letter as "protected." That denial was appealed to the Attorney General to use his discretion in disclosing the letter or to redact Eric Holder's address and release the letter. Another denial was received. On July 3, 2009, an appeal was made to the State Records Committee. Since Mark Shurtleff had mentioned the document in a media interview, a copy of the letter would be preferable to innuendo about the strain between Brett Tolman and the Attorney General's Office. Dan Harrie was sworn as a witness. He said a well-known issue was criticism of the U.S. Attorney General's handling of the artifacts case in Southern Utah. Another public disagreement was about Rick Koerber

who was charged in federal court with running a hundred million dollar Ponzi scheme. The Utah State Department of Commerce had consulted with the Attorney General's Office and that department had decided there was not evidence for a civil action against Mr. Koerber. So, the Commerce office took the case to the U.S. Attorney General's Office. Later, Mr. Koerber was indicted. These disputes were the kind of things the letter could have discussed.

Michael Patrick O'Brien said that executive privilege did not apply to the letter as it was a communication between different branches of the government. The Attorney General's Office claimed the letter was "protected" as a personal recommendation. GRAMA applies not only to the letters generated by governmental entities but also to letters received which may have personal private data in them. The letter, if it were on official letterhead and dealt with the issues of government, would be more likely to be a public document.

Testimony – respondent

Mr. Jerrold Jenson asked to have Mr. Scott Reed from the Attorney General's Office sworn as a witness. He said he was the division chief of the Criminal Justice Division and had been with the office for fifteen years. His role was to manage the criminal prosecutions for the office. There are eighteen prosecutors who prosecute a variety of crimes state-wide. A children's justice division focuses on crimes related to crimes against children. An investigation unit deals with large-scale white-collar crimes, Medicaid and insurance fraud. The federal authority is also state wide. Some state and federal crimes are virtually identical and are enforced by both offices. With finite resources, the two offices have to coordinate for the public good. The timing of the letter was in March of 2009. New relationships were being established with Attorney General Holder and state authorities. The relics arrests had not occurred and the Rick Koerber case had only been presented to the Utah Attorney General as a regulatory case by the Department of Commerce. Both of the cases surfaced long after the letter was written. The letter was definitely a personal recommendation from Mark Shurtleff about Brett Tolman and issues dealing with the U.S. Attorney General's Office locally. Things between the two offices have improved and daily communication occurs between them. A special relationship occurs between the offices as to how to use resources to protect the public. Some communications must be made in confidence in order to accomplish this. Revisiting issues that have been resolved serves no positive purpose.

Deliberation

Mr. Daniels made a motion that the Committee move into executive session to examine the document. Mr. Hemphill seconded the motion. A vote was taken. Mr. Daniels, Mr. Hansen, Mr. Hemphill, Mr. Ott, Ms. Ross, Ms. Smith-Mansfield, and Mr. Whittaker voted for the motion. The motion passed. The Committee went into executive session to view the letter.

Closed session: 10:36 a.m. – 10:50 a.m.

Closing – petitioner

Mr. O'Brien said that the weighing process was important and the Attorney General's Office would have to prove that the need for protection of the document outweighed the public's need to know about an important issue. The arguments against disclosing the letter seem to be an attempt to hide what was written or prevent embarrassment of a public official. Making the letter public would provide accountability. The case cited by Mr. Reed took place before GRAMA was enacted. Mark Shurtleff was writing the letter as the state attorney general. There was only one letter disclosed to the petitioner and that had to do with opposing reinstatement of the assault weapons ban. When public officials have disagreements, it is only natural to want to keep discord from their employers: the public. He said that the natural light in the meeting room was a good metaphor for the shedding of light on the document in this case.

Closing – respondent

Mr. Jensen said state agencies work together differently from the unique relationship between the federal and state government. There is not a law that says executive privilege trumps GRAMA or the other way around. A court ruling issued before GRAMA, *Madsen vs. Salt Lake City Corporation*, stated that government heads could claim executive privilege of documents not within their control if nondisclosure would serve the public interest. The privilege is not absolute and the government's interest in maintaining confidentiality must be weighed against the interests of those seeking disclosure of the material. The principle is applicable, and the Attorney General's Office does not regard GRAMA as having overruled executive privilege. The letter is clearly a personal recommendation of the Attorney General along with a recommendation of what should happen between the departments. The dispute discussed in the letter was water under the bridge, and disclosing the letter was not in the public interest.

Deliberation

Ms. Ross made a motion that the record requested was not appropriately classified as "protected" according to 63G-2-305(25) and was not a personal recommendation. Therefore the letter was public and should be disclosed with the redaction of Mr. Holder's personal address. Mr. Hemphill seconded the motion. Mr. Daniels proposed an amendment to the motion that UCA 63G-2-305(25) was not operative to make the document a protected record neither as a personal recommendation nor an unwarranted invasion of personal privacy and should be disclosed with the exception of Mr. Holder's home address which is private pursuant to 63G-2-303(1)(a)(9). Mr. Hemphill seconded the motion. A vote was taken. Mr. Daniels, Mr. Hansen, Mr. Hemphill, Mr. Ott, Ms. Smith-Mansfield, and Mr. Whittaker voted for the motion. Ms. Ross voted against the motion. The motion passed. Mr. Whittaker said that an order would be drafted and sent to the parties within five business days.

Continued hearing – Eric Peterson vs. Utah Attorney General's Office

Mr. Whittaker said that the hearing had been held previously. The Committee members had looked at the documents in question twice, most recently with Bates stamps so that each of the documents was numbered. Participating would be the Committee members that were present for both previous hearings. Ms. Smith-Mansfield and Mr. Ott were recused. Mr. Daniels made a motion that the Committee go into executive session to view the documents.

Ms. Ross seconded the motion. The Committee voted unanimously to go into executive session.

Closed session: 11:45 – 12:20

Open session

Ms. Ross made a motion to go into open session. Mr. Hemphill seconded the motion. Mr. Daniels, Mr. Hansen, Mr. Hemphill, Ms. Ross, and Mr. Whittaker voted to go back into open session. The motion passed.

Deliberation

Mr. Whittaker said the Committee had come to a consensus of the documents that were public and those that were nonpublic. He read the list that follows and that would be incorporated into an order and sent to the parties within five business days.

BATES STAMP	DOCUMENT IDENTIFICATION	CLASSIFICATION OF DOCUMENT AS DETERMINED BY THE COMMITTEE
1-2	Print out of Website California business portal, dated April 6, 2006	Public
3-4	E-mails from Helen Peterson to Scott Reed, dated May 18, 2006	Public
5	Letter from Jeffrey Buckner to Attorney B. Ray Zoll dated October 6, 2006	Public (Note: This document was previously provided to Peterson)
6-13	E-mails from Blaine Ferguson to Werner Haidenthaller with attachment, dated September 26, 2007, and October 5, 2007	Public
14-17	Four E-mails from Lori Edwards to Ao Pauga with responses dated January 3, 2008	Public
18-20	E-mail with attachment from Jeff Buckner to Lori Edwards dated January 8, 2008	18 Public 19-20 Protected UCA 63G-2-305(22)
21-27	Seven e-mails from Lori Edwards to Ao Pauga dated January 9, 2008	Public
28-29	E-mail from Jeff Buckner to Kevin Olsen, dated January 24, 2008	Protected UCA 63G-2-305(16), (17), (18), and (23)
30-31	E-mail from Jeff Buckner to Blaine Ferguson, dated January 24, 2008	Protected UCA 63G-2-305(16), (17), (18) and (23)
32	E-mail from Jeff Buckner to Blaine Ferguson,	Protected UCA 63G-2-

	dated January 30, 2008	305(16), (17), (18), and (23)
33	E-mail from Jeff Buckner to Blaine Ferguson and Ronald Ockey, dated January 30, 2008	Public
34	E-mail from Jeff Buckner to Blaine Ferguson and Ronald Ockey, dated January 30, 2008	Protected UCA 63G-2-305(18)
35-36	Two e-mails from Jeff Buckner to Blaine Ferguson and Ronald Ockey, dated January 30, 2008	Public
37-57	Series of e-mail correspondence from Jeff Buckner to Blaine Ferguson and Ronald Ockey, dated January 30, 2008	Protected UCA 63G-2-305(17), (18) and (23)
58	E-mail from Blaine Ferguson to Mark Shurtleff, dated January 30, 2008	Protected UCA 63G-2-305(17), and (23)
59	E-mail from Kirk Torgensen to Mark Shurtleff and Blaine Ferguson	Protected UCA 63G-2-305(17), (18), and (23)
60	E-mail from Jeff Buckner to Blaine Ferguson and Ronald Ockey, dated January 30, 2008	Public
61	E-mail from Jeff Buckner to Blaine Ferguson and Ronald Ockey, dated January 31, 2008	Protected UCA 63G-2-305(17), (18), and (23)
62	E-mail from Jeff Buckner to Kevin Olsen, dated February 8, 2008	Protected UCA 63G-2-305(17), (18), and (23)
63	E-mail from Jeff Buckner to Francine Giani, Thad Levar, Kent Nelson, and Kevin Olsen, dated February 13, 2008	Protected UCA 63G-2-305(17), (18), and (23)
64	E-mail from Jeff Buckner to Blaine Ferguson, dated February 18, 2008	Protected UCA 63G-2-305(17), (18), and (23)
65-66	E-mail from Blaine Ferguson to Mark Shurtleff and Kirk Torgensen, dated February 19, 2008	Protected UCA 63G-2-305(17), (18), and (23)
67	E-mail from Kirk Torgensen to Blaine Ferguson, dated February 19, 2008	Public
68	E-mail task reminder from Lori Edwards, Dated February 27, 2008	Public
69	E-mail from Mark Shurtleff to Jeff Buckner, dated April 2, 2008	Public
70-72	Series of 3 e-mails between Jeff Buckner and Mark Shurtleff, dated April 3, 2008	Protected UCA 63G-2-305(18), and (23)
73-78	Series of e-mails between Jeff Buckner and Lori Edwards, dated April 3, 2008	Public
79-80	Series of e-mails between Jeff Buckner and Lori Edwards, dated April 4, 2008	Public
81-83	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)
84	E-mail from Jeff Buckner to Lori Edwards, dated April 4, 2008	Public

85-86	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)
87	E-mail from Jeff Buckner to Lori Edwards, dated April 9, 2008	Public
88-90	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)
91	E-mail from Lori Edwards to Jeff Buckner	Public
92-94	Printout of Web site, Utah Commerce Department, dated April 9, 2008	Public
95	E-mail from Jeff Buckner to Lori Edwards, dated April 9, 2008	Public
96-97	E-mail from Blaine Ferguson to Mark Shurtleff, dated April 22, 2008	Public
98	E-mail from Jeff Buckner to Lori Edwards, dated April 22, 2008	Public
99-101	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)
102-103	Series of e-mails between Jeff Buckner and Lori Edwards, dated April 22, 2008	Public
104-109	Series of e-mails between Jeff Buckner and Lori Edwards, dated April 23, 2008	Public
110	E-mail from Lori Edwards to Angela Hendricks, dated February 18, 2009	Public
111-118	Draft letter by Jeff Buckner, dated October 10, 2006	Protected UCA 63G-2-305(22)
119-121	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)
122-127	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)
128-129	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)
130-135	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)
136-141	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)
142-144	Draft pleading by Jeff Buckner, undated	Protected UCA 63G-2-305(22)

Ms. Ross made a motion that the Committee adopt the classification of the records as read by Mr. Whittaker, and that in the release of the records, a list be provided that includes a header or other identifying information such as date on each record that is withheld. Mr. Hemphill seconded the motion. A vote was taken. Mr. Daniels, Mr. Hansen, Mr. Hemphill, Ms. Ross, and Mr. Whittaker voted for the motion. The motion passed. Mr. Whittaker said that an order would be sent to the parties within five business days. He said it had been a difficult case and thanked Mr. Peterson for his patience.

Approval of Minutes

Mr. Daniels made a motion to approve the August 13, 2009, meeting minutes. Mr. Hemphill had made some minor editing changes and seconded the motion. A vote was taken. Mr. Daniels, Mr. Hemphill, Mr. Hansen, Mr. Ott, and Mr. Whittaker voted for the motion. The motion passed. Ms. Ross and Ms. Smith-Mansfield abstained from voting as they had not attended the meeting.

Appeals received

A Washington County appeal has been received for minutes from Dixie Deer Special Service District. Accident reports have been requested and denied from Public Safety. Pamela Brady vs. Utah Department of Public Safety is one, and Scott Vaughn vs. Utah Highway Patrol was appealed to the Utah Department of Public Safety. Two prehearings have been requested by Dan Schroeder and Rob Alvey.

Cases in District Court

Mr. Tonks reported on cases in District Court. See attached list of cases and actions.

Other business

Ms. Smith-Mansfield said the Committee is required to establish a procedure for the approval of minutes. She suggested that the rule say that drafts of written minutes be available for approval at the next Committee meeting and be approved by a vote of the Committee. She asked that a rule be prepared for official action at the next meeting. Ms. Smith-Mansfield suggested that counsel provide training in the Open and Public Meetings Act training. The Attorney General's Office will provide the training. The training is tentatively planned for November, 2009.

Adjournment

Mr. Whittaker thanked the Committee for their attendance and the meeting was adjourned by acclamation.

Next meeting scheduled for October 8, 2009, at 9:00 a.m.

September 2009 Records Committee Case Updates

District Court Cases

Douglas Carter v. Utah Dept. Of Corrections, 3rd Judicial District, Salt Lake County, Case No. 080916813, Judge Denise Lindberg. Filed August 14, 2008.

Current Disposition: Show Cause hearing scheduled by the Court to be held on November 2, 2009 at 2:00 PM.

Murray City v. Maese, 3rd Judicial District, Salt Lake County, Case No. 080912185, Judge Christiansen. Filed July 11, 2008.

Current Disposition: Cross motions for summary judgment filed by both parties. On August 3, 2009 filed memorandum contra to Maese's motion for summary judgment arguing that Maese was foreclosed from requesting reversal of state records decision (appeal untimely), a decision previously ruled upon by the Court. Request to submit motions and request for oral argument filed by Murray City on August 17, 2009.

Utah Dept. of Corrections v. Clanton, 3rd Judicial District, Salt Lake County, Case No. 080909757, Judge Lindberg. Filed June 13, 2008.

Current Disposition: Parties have filed cross motions for summary judgment. Once reply memorandum have been filed, parties will probably submit case to the Court for a decision.

West Daniels Land Association v. Wasatch Cty., 4th Judicial District, Wasatch County, Case No. 080500196. Filed April 28, 2008.

Current Disposition: Show Cause hearing scheduled by the Court to be held in Heber City on September 29, 2009 at 8:30 AM.

Tolton v. Town of Alta, 3rd Judicial District, Salt Lake County, Case No. 030914055, Judge Hilder. Filed June 23, 2003.

Current Disposition: Order of Dismissal filed by Court on August 25, 2009. Will wait to see if an appeal is filed.

Utah Supreme Court Cases

Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, Utah Supreme Court, Case No. 20060813-CA. District Court Case No. 050909118, Judge Medley.

Current Disposition: Trial Court issued a decision on August 26, 2009 denying SUWA's Motion for Award of Costs and Fees finding that SUWA failed to file a timely notice of claim. Court also held that even though the State Records Committee was a party to the case, the Committee should not be held liable for costs and fees when the Committee did not actively participate as an interested party in the appeal.